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**Muafakat Kekal Sdn Bhd & Anor v Pesuruhjaya Bangunan
Majlis Bandaraya Petaling Jaya & Anor**

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-02(NCVC)(W)-143-01 OF 2013
ZAHARAH IBRAHIM, ANANTHAM KASINATHER AND MAH
WENG KWAI JJCA

C

23 SEPTEMBER 2014

Land Law — Strata title — Management corporation — Legal existence of new entity as management corporation for condominium — Appointment of council in general meeting — General meeting held at different location and copy of minutes of meeting was sent to first defendant — Failure to produce required audited accounts — Whether council was lawfully constituted — Whether res judicata and estoppel operated so as to bar plaintiffs from challenging lawfulness/legality of establishment of joint management body

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The first plaintiff developed a housing project known as Palm Spring Condominium @ Damansara ('the condominium'). It was the original proprietor of that lot of land on which the condominium was developed. By virtue of the provisions of the Strata Titles Act 1985 ('Act 318'), the second plaintiff came into legal existence as the management corporation for the condominium.

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The first general meeting of the second plaintiff was called by the first plaintiff as the original proprietor of the condominium, to be held on 4 September 2011. However, due to lack of quorum, that general meeting was adjourned to 11 September 2011. On 11 September 2011, no general meeting was held by the first plaintiff who claimed that it was not possible nor safe to proceed with the general meeting due to the disturbance caused by the second defendant. However, the second defendant claimed that the adjourned general meeting was duly held on 11 September 2011 and that a council was appointed on that date during that general meeting. On 15 October 2011, the first plaintiff held a general meeting at a different location and a copy of the minutes of the meeting was sent to the first defendant. The dispute between the two factions led to a meeting convened by the Federal Director General of Land and Mines and that meeting resolved that the first defendant was to direct the first plaintiff to produce the audited accounts of the first plaintiff from 2008 until the current period, failing which the general meeting held on 11 September 2011 would be held to be valid and the appointment of members of the council on that date would also be held to be valid. The first plaintiff however claimed that it could not produce the required audited accounts in view of the fact that by suit No S5-22-868 of 2006, the second defendant had at first obtained an ex parte injunction and a permanent injunction against the

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first plaintiff and had excluded the first plaintiff from the management of the condominium and had in fact commenced committal proceedings against the first plaintiff for its failure to comply with the terms of the injunction. The High Court held, *inter alia*, that as the second defendant came into existence pursuant to the first plaintiff's own act in calling the meeting for the second defendant's establishment, the first plaintiff was estopped from claiming that the second defendant's existence was illegal/unlawful. It was also held that estoppel must also operate against the first plaintiff as it had entered into a consent judgment whereby the first plaintiff had agreed not to prevent the second defendant from managing the condominium. The issues that arose in this appeal were whether the second defendant was lawfully constituted; whether *res judicata* and estoppel operated so as to bar the plaintiffs from challenging the lawfulness/legality of the establishment of the second defendant.

Held:

- (1) The court was unable to find any evidence as to the date the condominium was completed and vacant possession of the parcels delivered to the purchasers by the developer. This fact if known would have greatly assisted. There did not appear to be express provisions as to who was to perform the functions of a management corporation pending the election of its council at the first general meeting. However, the provisions of s 40 of Act 318 implied that during the initial period before such election, it was the original proprietor which had the duty of performing the functions of the management corporation (see paras 23 & 33–34).
- (2) Once a management corporation comes into existence, not only could there be no joint management body formed, an existing joint management body would also automatically dissolved under s 15 of Act 663. In view of the Legislative scheme as contained in Act 318, in particular the provisions of ss 15 and 17, and ss 39–49 of Act 318, and as contained in Act 663, in particular s 15 of Act 663, the argument that a joint management body could be legally established under Act 663 once a management corporation had come into existence under Act 318 could not be sustained. The second defendant was unlawfully constituted and that its establishment was null and void *ab initio* (see paras 39–41).
- (3) No order, be it an order made after full trial, or in an interlocutory proceeding, or a consent order or an order made in dismissing an application for leave to commence judicial review proceedings, could operate so as to preclude a challenge to an order or a decision on the grounds of illegality or unlawfulness or as being contrary to law/statute. The first plaintiff in facilitating the establishment of the second defendant in April 2008 could not, operate so as to estop the plaintiffs

A from challenging the unlawfulness of the establishment of the second defendant, especially in view of the fact that at that point in time the certificate certifying the establishment of the management corporation had not yet been issued by the registrar. It was issued 12 months later (see paras 43 & 45).

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[Bahasa Malaysia summary]

Plaintif pertama membangunkan projek perumahan dikenali sebagai Palm Spring Condominium @ Damansara ('kondominium'). Ia adalah pemilik asal tanah lot tersebut di mana kondominium dibangunkan. Mengikut peruntukan-peruntukan Akta Hakmilik Strata 1985 ('Akta 318'), plaintif kedua wujud secara sah sebagai perbadanan pengurusan untuk kondominium tersebut. Mesyuarat am pertama plaintif kedua dipanggil oleh plaintif pertama sebagai pemilik asal kondominium, untuk diadakan pada 4 September 2011. Walau bagaimanapun, akibat kekurangan korum, mesyuarat am tersebut ditangguhkan kepada 11 September 2011. Pada 11 September 2011, tiada mesyuarat am diadakan oleh plaintif pertama yang mendakwa yang ia tidak mungkin atau selamat untuk diteruskan dengan mesyuarat am akibat campur tangan disebabkan oleh defendan kedua. Walau bagaimanapun, defendan kedua mendakwa bahawa mesyuarat am yang ditangguhkan tersebut diadakan pada 11 September 2011 dan majlis dilantik pada tarikh tersebut semasa mesyuarat am tersebut. Pada 15 Oktober 2011, plaintif pertama mengadakan mesyuarat am di lokasi berlainan dan salinan minit mesyuarat dihantar kepada defendan pertama. Pertikaian di antara kedua-dua pihak membawa kepada mesyuarat yang diadakan oleh Ketua Pengarah Persekutuan Tanah dan Galian dan mesyuarat tersebut memutuskan bahawa defendan pertama dikehendaki mengarahkan plaintif pertama untuk mengemukakan akaun plaintif pertama yang diaudit dari 2008 hingga tempoh semasa, kegagalannya akan membuatkan mesyuarat am yang diadakan pada 11 September 2011 akan diputuskan sah dan pelantikan ahli majlis pada tarikh tersebut juga akan diputuskan sah. Plaintif pertama walau bagaimanapun mendakwa ia tidak dapat mengemukakan akaun yang diaudit yang dikehendaki tersebut mengambil kira fakta bahawa dengan Guaman No S5-22-868 Tahun 2006, defendan kedua telah pertama kali memperolehi injunksi ex parte dan injunksi kekal terhadap plaintif pertama dan telah mengecualikan plaintif pertama daripada pengurusan kondominium dan sebenarnya memulakan prosiding komital terhadap plaintif pertama kerana kegagalannya untuk mematuhi terma injunksi tersebut. Mahkamah Tinggi memutuskan, antara lain, bahawa memandangkan defendan kedua wujud berikutan tindakan persendirian plaintif pertama dalam memanggil mesyuarat untuk penubuhan defendan kedua, plaintif pertama diestop daripada mendakwa bahawa kewujudan defendan kedua adalah haram/tak sah. Ia juga diputuskan bahawa estoppel mesti beroperasi terhadap plaintif pertama kerana ia telah memasuki penghakiman izin di mana plaintif pertama bersetuju untuk tidak menghalang defendan kedua daripada menguruskan kondominium tersebut. Isu-isu yang

berbangkit dalam rayuan ini adalah sama ada defendan kedua adalah ditubuhkan secara sah; sama ada res judicata dan estoppel beroperasi untuk menghalang plaintif-plaintif daripada membantah kesahan penubuhan defendan kedua.

Diputuskan:

- (1) Mahkamah tidak dapat untuk mendapatkan apa-apa keterangan terhadap tarikh kondominium siap dan milikan kosong bangunan diberikan kepada pembeli-pembeli oleh pemaju. Fakta ini jika diketahui akan sangat membantu. Tidak terdapat peruntukan nyata mengenai siapa yang patut melakukan fungsi perbadanan pengurusan sementara pemilihan ahli majlisnya di mesyuarat am pertama. Walau bagaimanapun, peruntukan s 40 Akta 318 tersirat bahawa semasa tempoh permulaan sebelum pemilihan tersebut, ia adalah pemilik asal yang mempunyai tugas menjalankan fungsi perbadanan pengurusan (lihat perenggan 23 & 33–34).
- (2) Sebaik sahaja perbadanan pengurusan wujud, bukan sahaja badan pengurusan bersama boleh dibentuk, badan pengurusan bersama yang sedia ada juga akan dibubarkan di bawah s 15 Akta 663. Mengambil kira skim perundangan seperti yang terdapat dalam Akta 318, terutamanya peruntukan ss 15 dan 17, dan ss 39–49 Akta 318, seperti yang terdapat dalam Akta 663, terutamanya dalam s 15 Akta 663, hujahan bahawa badan pengurusan bersama boleh ditubuhkan secara sah di bawah Akta 663 apabila perbadanan pengurusan wujud di bawah Akta 318 tidak dapat dikekalkan. Defendan kedua dibentuk secara tidak sah dan penubuhannya adalah batal dan void ab initio (lihat perenggan 39–41).
- (3) Tiada perintah, sama ada perintah yang dibuat selepas perbicaraan penuh, atau dalam prosiding interlokutori, atau perintah izin atau perintah yang dibuat dalam menolak permohonan untuk izin memulakan prosiding semakan kehakiman, boleh beroperasi seperti untuk menghalang cabaran kepada perintah atau keputusan atas alasan menyalahi undang-undang atau tak sah atau sebagai bertentangan kepada undang-undang/statut. Plaintif pertama dalam memudahkan penubuhan defendan kedua pada April 2008 tidak dapat, beroperasi seperti untuk estop plaintif-plaintif daripada mencabar ketaksahan penubuhan defendan kedua, terutamanya mengambil kira fakta bahawa pada masa tersebut sijil yang mengesahkan penubuhan perbadanan pengurusan belum lagi dikeluarkan oleh pendaftar. Ia dikeluarkan 12 bulan kemudian (lihat perenggan 43 & 45).]

Notes

For cases on management corporation, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5280–5302.

A Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189;
[1995] 3 CLJ 783, SC (folld)
Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1
MLJ 393, FC (folld)

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Legislation referred to

Building and Common Property (Maintenance and Management) Act 2007
ss 4(1), 4(1)(a), 15
C Strata Titles Act 1985 ss 4, 15, 15(2), 17, 39, 39(2A), 40, 41, 41A, 42,
43, 44, 45, 46, 47, 48, 49, Form 2

Ringo Low (Ringo Low & Assoc) for the appellants.
KF Lim (Rusmah Arunan & Assoc) for the first respondent.
D *Harpal Singh Grewal (Robin Lim Fang Say and Reny Rao with him) (Azri Lee
Swee Seng & Co) for the second respondent.*

Zaharah Ibrahim JCA (delivering judgment of the court):

BACKGROUND FACTS

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[1] For ease of reference, the parties to this appeal will be referred to in this judgement as they were in the High Court.

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[2] The first plaintiff developed that housing project known later as Palm Spring Condominium @ Damansara ('the condominium'). It was the original proprietor of that lot of land on which the condominium was developed.

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[3] On 8 January 2008, by virtue of the provisions of the Strata Titles Act 1985 ('Act 318'), the second plaintiff came into legal existence as the management corporation for the condominium.

[4] On 5 April 2008, the second defendant was established.

H

[5] The first general meeting of the second plaintiff was called by the first plaintiff as the original proprietor of the condominium, to be held on 4 September 2011. The second defendant's application to the High Court for an injunction to restrain the first plaintiff from holding that general meeting was dismissed by the High Court on 2 September 2011. However, due to lack of quorum, that general meeting was adjourned to 11 September 2011.

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[6] On 11 September 2011 no general meeting was held by the first plaintiff who claimed that it was not possible nor safe to proceed with the general meeting due to the disturbance caused by the second defendant.

[7] However, the second defendant claimed that the adjourned general meeting was duly held on 11 September 2011 and that a council was appointed on that date during that general meeting. A

[8] On 15 October 2011 the first plaintiff held a general meeting at a different location and a copy of the minutes of the meeting was sent to the first defendant. B

[9] The dispute between the two factions led to a meeting convened by the Federal Director General of Land and Mines on 8 November 2011 and that meeting resolved that the first defendant was to direct the first plaintiff to produce the audited accounts of the first plaintiff from 2008 until the current period, failing which the general meeting held on 11 September 2011 would be held to be valid and the appointment of members of the council on that date would also be held to be valid. C
D

[10] The first plaintiff however claimed that it could not produce the required audited accounts in view of the fact that by Suit No S5-22-868 of 2006, the second defendant had at first obtained an ex parte injunction on 28 August 2008 and a permanent injunction on 28 June 2010 against the first plaintiff and had excluded the first plaintiff from the management of the condominium and had in fact commenced committal proceedings against the first plaintiff for its failure to comply with the terms of the injunction. E

THE SUIT F

[11] It was against that backdrop of facts that the plaintiffs commenced this suit claiming the following reliefs:

- (a) a declaration that the general meeting called by the first plaintiff on 15 September 2011 (sic) was valid and in accordance with Act 318; G
- (b) a declaration that the general meeting on 11 September 2011 was not conducted by the first plaintiff and was null and void;
- (c) a declaration that the establishment of the second defendant was not valid and contravened para 4(1)(a) of the Building and Common Property (Maintenance and Management) Act 2007 ('Act 663'); H
- (d) a declaration that the act of the first defendant who attempted to validate the meeting of 11 September 2011 and the appointment of members of the council on 11 September 2011 was 'ultra vires' (sic); I
- (e) general damages;
- (f) interest; and
- (g) costs.

- A** [12] The second defendant, claiming that it was lawfully constituted, and pleading *res judicata* and estoppel, counterclaimed for the following reliefs:
- (a) a declaration that the general meeting held on 11 September 2011 was valid and in accordance with Act 318;
 - B** (b) a declaration that the general meeting held on 15 October 2011 was null and void;
 - (c) a declaration that the second defendant was a body lawfully established under Act 663;
 - C** (d) an order that any new account or management fund under s 45 or special account under s 46 of Act 318 opened by the first plaintiff pursuant to the general meeting of 15 October 2011 be closed forthwith and all monies in those accounts be paid into the account maintained by the second defendant;
 - D** (e) general damages to be assessed;
 - (f) exemplary and aggravated damages of RM500,000, or alternatively to be assessed;
 - E** (g) interests; and
 - (h) costs.

DECISION OF THE HIGH COURT

- F** [13] The suit was heard in a full trial.
- [14] In the learned High Court judge's 58 page grounds of judgement the facts of the dispute between the parties were set-out in great detail, particularly those relating to the general meetings of 11 September 2011-15 October 2011.
- G**
- [15] Her Ladyship held, *inter alia*, that as the second defendant came into existence on 5 April 2008 (or 4 April 2008 as stated in the grounds of judgement) pursuant to the first plaintiff's own act in calling the meeting for the second defendant's establishment, the first plaintiff was estopped from claiming that the second defendant's existence was illegal/unlawful.
- H**
- [16] Her Ladyship also held that estoppel must also operate against the first plaintiff as it had entered into a consent judgement on 28 June 2010 in Suit No S5-22-868 of 2008 whereby the first plaintiff had agreed not to prevent the second defendant from managing the condominium. It had also agreed to surrender all relevant items and documents to enable the second defendant to perform such management role.
- I**

[17] Apart from estoppel, the learned High Court judge also found that res judicata operated against the plaintiffs as the substance of the present suit was substantially the same as the subject matter of the first plaintiff's application for leave for judicial review in Shah Alam High Court in Suit No MT2-13 of 2008. Her Ladyship held that as leave was refused, the learned judge hearing the application must have held that the application was frivolous.

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[18] The learned High Court judge then dismissed the plaintiffs' claim and allowed the second defendant's counterclaim.

[19] That part of the High Court order dated 14 December 2012 allowing the second defendant's counterclaim was in the following terms:

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ADALAH SETERUSNYA DIHAKIMKAN bahawa Tuntutan Balas Defendan Kedua adalah dibenarkan seperti berikut:-

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- (a) Suatu Perintah Deklarasi bahawa Mesyuarat Agung yang diadakan pada 11.9.2011 adalah sah dan selaras dengan Akta Hakmilik Strata 1985 (Akta 318);
- (b) Suatu Perintah Deklarasi bahawa Mesyuarat Agung yang diadakan pada 15.10.2011 adalah batal dan tidak sah ('null and void');
- (c) Suatu Perintah Deklarasi bahawa Defendan Kedua (Palm Spring JMB) adalah sebuah badan yang sah ditubuhkan di bawah Akta Bangunan Dan Harta Bersama (Penyenggaraan Dan Pengurusan) 2007 (Akta 663);
- (d) Suatu Perintah bahawa apa-apa akaun baru atau akaun pengurusan ('Management Fund') di bawah seksyen 45 Akta 318 atau akaun khas ('Special Account') di bawah seksyen 46 Akta 318 yang dibuka oleh Plaintiff Pertama ekoran Mesyuarat Agung pada 15.10.2011 ditutup dengan serta merta dan segala wang dalam apa-apa akaun baru atau akaun pengurusan ('Management Fund') di bawah seksyen 45 Akta 318 atau akaun khas ('Special Account') di bawah seksyen 46 Akta 318 dibayar balik ke akaun yang dipegang oleh Defendan Kedua;

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DAN SETERUSNYA DIHAKIMKAN bahawa Plaintiff Pertama membayar Gantirugi Am dan Gantirugi Teladan sebanyak RM 500,000.00 kepada Defendan Kedua dengan faedah pada kadar 4% setahun dari tarikh pemfailan Saman ini sehingga ke tarikh penyelesaian penuh.

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THE APPEAL

[20] The plaintiffs appealed to this court against that order of the High Court.

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A [21] However, when the parties appeared before us on 22 July 2013, counsel for the plaintiffs conceded paras (a)–(b) of the order of the High Court. We therefore heard submissions only on the legitimacy of the second defendant and the orders made in its favour.

B ISSUES DURING APPEAL

[22] The issues before us were therefore:

- (1) whether the second defendant was lawfully constituted; and
- C (2) whether *res judicata* and estoppel operated so as to bar the plaintiffs from challenging the lawfulness/legality of the establishment of the second defendant.

D ANALYSIS OF ISSUES

Whether the second defendant was lawfully constituted

E [23] After perusing the record of appeal, we were unable to find any evidence as to the date the condominium was completed and vacant possession of the parcels delivered to the purchasers by the developer. This fact if known would have greatly assisted us within the context of sub-s 4(1) of Act 663.

F [24] What was NOT in dispute was that a certificate dated 8 January 2008 was issued by the Director of Land and Mines of Selangor under sub-s 39(2A) of Act 318. The director, presumably in his capacity as the registrar of titles, signed it on 7 April 2009. In other words the certificate certifying the fact of the incorporation of the management corporation for the condominium was issued some 15 months after the actual date of that management corporation coming into existence by operation of law under s 39 of Act 318.

H [25] The problem that arose in this case was that while a management corporation had come into existence by operation of law under s 39 of Act 318 on 8 January 2008, a meeting was held and a joint management body was established on 5 April 2008, some three months later, under Act 663.

Establishment of management corporation under Act 318

I [26] Under s 15 of Act 318, upon application being made by the proprietor of the lot on which a subdivided building has been built and upon the specified conditions having been complied with, a strata register will be opened by the registrar of titles and that register (consisting of a series of books, each relating to one lot) will contain, among others:

- (a) an index in Form 2 to the individual parcels and, if any, appurtenant accessory parcels and to the individual provisional block, if any, comprised in the lot; **A**
- ...
- (d) the register document of title to each parcel and each provisional block. **B**

[27] Form 2 will contain the name of the management corporation that will come into being upon the opening of the strata register. That name must be supplied by the proprietor of the lot as required by sub-s 15(2). **C**

[28] Under s 17 of Act 318, when a book of strata register is opened, the strata register and the document of title to the lot will have a memorial entered by the registrar of titles stating that such book has been opened. **D**

[29] Under s 39 of Act 318, the management corporation with the name as stated in the strata register comes into existence upon the opening of the book of strata register. Section 39 reads as follows:

Establishment of management corporation **E**

- 39(1) Upon the opening of a book of the strata register in respect of a subdivided building there shall, by the operation of this section, come into existence a management corporation consisting of all the parcel proprietors including in the case of phased development, the proprietor of the provisional block or blocks. **F**
- (2) The management corporation established by subsection (1) shall be known by the name appearing in the book of the strata register relating to a subdivided building, and shall be a body corporate having perpetual succession and a common seal. **G**
- (2A) The management corporation may apply to the Registrar for a certificate certifying that the management corporation is a body corporate constituted under this Act on the day specified in the certificate. **H**
- (3) The management corporation may sue and be sued. **H**
- (4) The management corporation shall elect a council which, subject to any restriction imposed or direction given by the management corporation at a general meeting, shall perform the management corporation's duties and conduct the management corporation's business on its behalf, and may for that purpose exercise any of the management corporation's powers. **I**
- (5) The provisions of the Second Schedule shall have effect in relation to the management corporation and its council.

- A [30] The memorial under s 17 will also contain a statement to the effect that the common property of the strata development is vested in the management corporation.
- B [31] The vesting of the common property in the management corporation is expressly provided for in s 42 of Act 318. The management corporation, upon coming into existence, also becomes the custodian of the issue document of title of the lot.
- C [32] Section 41 of Act 318 requires the developer to convene the first general meeting of the management corporation within one month of the expiry of the initial period. The term 'initial period' is defined in s 4 of Act 318 as follows:
'initial period' in relation to a management corporation, means the period commencing on the day on which the management corporation is formed and ending on the day on which there are proprietors, excluding the proprietor of the lot who is registered as the proprietor of a parcel or parcels or a provisional block or blocks, the sum of whose share units is at least one-third of the aggregate share units.
- D
- E [33] There do not appear to be express provisions as to who is to perform the functions of a management corporation pending the election of its council at the first general meeting. However, the provisions of s 40 of Act 318 imply that during the initial period before such election it is the *original proprietor* which has the duty of performing the functions of the management corporation.
- F [34] Section 40 of Act 318 provides as follows:
40(1) Notwithstanding any other provisions of this Act, the management corporation shall not, during the initial period —
- G (a) amend, add to or repeal its by-laws in such a manner that a right is conferred or an obligation is imposed on one or more but not all, proprietors or in respect of one or more, but not all, parcels or provisional blocks;
- H (b) borrow moneys or give securities; or
- (c) enter into any maintenance or service contracts for any periods extending beyond the expiration of the initial period.
- I (2) Without prejudice to any other remedy available against the original proprietor, if a management corporation contravenes subsection (1), *the original proprietor shall be liable* for any loss suffered by the management corporation or any parcel proprietor as a result of the contravention and the management corporation or any parcel proprietor may recover from the original proprietor as damages for breach of a statutory duty, any loss suffered by it or him in consequence of such contravention.
(Emphasis added.)

[35] Under s 41A of Act 318, where the first annual general meeting of a management corporation has not been held, the proprietors of the parcels and provisional blocks must, nonetheless, pay sums of money to the management corporation as contributions. The amount to be paid is the amount approved by the State Director of Lands and Mines.

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[36] Sections 43–49 (both sections inclusive) of Act 318 set-out the powers and duties of the management corporation. A comparison of these provisions and those which provide for the powers and duties of the joint management body under Act 663 will show that the management corporation has similar and wider powers and duties.

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[37] Act 663 is meant to put in place a Legislative scheme to ensure the proper management and maintenance of a strata development pending the opening of a book of strata register and the coming into being of a management corporation.

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[38] The Minister for Housing and Local Government in tabling the Bill for second reading in the *Dewan Rakyat* on 12 December 2006 made this clear in his speech:

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Rang Undang-undang Bangunan dan Harta Bersama ini juga memperkenalkan satu elemen baru iaitu Badan Pengurusan Bersama dengan izin, Joint Management Body atau JMB yang ditubuhkan dalam tempoh interim untuk mengambil alih tugas dan tanggungjawab pemaju dalam menyelenggara dan mengurus harta bersama sesuatu bangunan itu *sehinggalah hak milik strata diperolehi*. (Emphasis added.)

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[39] Once a management corporation comes into existence, not only can there be no joint management body formed, an existing joint management body is also automatically dissolved under s 15 of Act 663.

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Conclusion

[40] In view of the legislative scheme as contained in Act 318, in particular the provisions of ss 15 and 17, and ss 39–49 of Act 318, and as contained in Act 663, in particular s 15 of Act 663, the argument that a joint management body can be legally established under Act 663 once a management corporation has come into existence under Act 318 cannot be sustained.

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[41] We were therefore of the considered view that the second defendant was unlawfully constituted and that its establishment was null and void ab initio.

Whether res judicata and estoppel operated against the plaintiffs

A [42] The second defendant relied upon the Supreme Court decision in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 in defending the learned High Court's finding that res judicata operated against the plaintiffs. Indeed, the very same decision was relied upon by the learned High Court judge in her judgement.

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C [43] In our view, no order, be it an order made after full trial, or in an interlocutory proceeding, or a consent order or an order made in dismissing an application for leave to commence judicial review proceedings, could operate so as to preclude a challenge to an order or a decision on the grounds of illegality or unlawfulness or as being contrary to law/statute.

D [44] We were of the considered view, relying, among others, upon the Federal Court decision in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, that the fact that the parties agreed to a consent order in Suit No S5-22-868 of 2008 or that the first plaintiff's application for leave for judicial review in Shah Alam High Court Suit No MT2-13 of 2008 was dismissed (and the appeal against that decision was withdrawn) could not bar the plaintiffs from challenging the unlawfulness of the establishment of the second defendant even though the substance of the subject matter of the two suits was similar to this suit.

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F [45] Similarly, the act of the first plaintiff in facilitating the establishment of the second defendant in April 2008 could not, in our view, operate so as to estop the plaintiffs from challenging the unlawfulness of the establishment of the second defendant, especially in view of the fact that at that point in time the certificate certifying the establishment of the management corporation had not yet been issued by the registrar. It was issued 12 months later.

G DECISION

[46] We accordingly allowed the appeal by the plaintiffs.

H [47] In view of the plaintiffs' concession with respect to paras (a)–(b) of the High Court order and our conclusion that the establishment of the second defendant was void ab initio, we varied the High Court order as follows:

- I (a) paras (a)–(b) of the High Court order were affirmed;
- (b) para (c) of the order and the order for damages were set aside; and
- (c) in para (d) of the order, the reference to the second defendant (the joint management body) was replaced with the reference to the second plaintiff (the management corporation).

Order accordingly.

Reported by Afiq Mohamad Noor

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